87-1481

No.



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**REECE MORREL, DONALD HERROLD AND J. CHARLES SHELTON,**
**Petitioners**

*v.*

**TRINITY BROADCASTING CORP., A MICHIGAN CORPORATION**
**Respondent**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

**Rule 54(b) of the** *Federal Rules of Civil Procedure* provides that where there are multiple parties or multiple claims in an action, a judgment disposing of one or more but fewer than all claims or parties is not final for purposes of appeal unless the trial court makes an express determination that there is no just reason for delaying appeal. The court of appeals found that this rule applies to consolidated actions, but limited its holding to prospective application only. The questions presented are:

1. Whether the court of appeals has jurisdiction to hear the present matter without Rule 54(b) certification that the summary judgment order in one of two consolidated cases is final for purposes of appeal.

2. Whether the court of appeals may limit its jurisdictional ruling to prospective application only, in spite of this Court's contrary holding in *Firestone Tire & Rubber v. Risjord*, 449 U.S. 368 (1981).

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OTHER AUTHORITIES

No.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**REECE MORREL, DONALD HERROLD AND J. CHARLES SHELTON,**
**Petitioners**

*v.*

**TRINITY BROADCASTING CORP., A MICHIGAN CORPORATION**
**Respondent**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

Reece Morrel, Donald Herrold and J. Charles Shelton petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit rendered August 26, 1987, rehearing and suggestion for rehearing en banc denied December 9, 1987, holding that an order of the United States District Court for the Northern District of Oklahoma was final for purposes of appeal, although future such orders would not be final.

## OPINIONS BELOW

The opinion of the United States Court of Appeals in its original decision (App. A, *infra*), is reported at 827 F.2d 673. The opinion of the United States Court of Appeals in its denial of the Petition for Rehearing and Suggestion for Rehearing En Banc (App. B, *infra*), is reported at 835 F.2d 245. The Order of the United States District Court (App. C, *infra*), is not reported.

## JURISDICTION

The jurisdiction of the federal district court was invoked under 28 U.S.C. § 1332(a). The decision of the court of appeals was entered on December 9, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

This case is of imperative public importance because the court of appeals is proceeding in this matter in spite of its own finding that it is without jurisdiction, since the order appealed from is not final. The court of appeals announced in the opinion below that finality is "discretionary," and a lack of subject matter jurisdiction is not an absolute bar to appeal in light of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982).

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions are set forth in App. D, *infra*.

## STATEMENT OF THE CASE

1. Respondent, Trinity Broadcasting Corporation (Appellant below), initially brought an action in the United States District Court against Lee R. Eller and Leeco Oil Company. Subsequently, Trinity Broadcasting filed another action in the same court against Reece Morrel, Donald Herrold and J.

Charles Shelton, Petitioners herein. Although Trinity Broadcasting could have joined all defendants in one action, it failed to do so. On December 3, 1983, the Honorable H. Dale Cook granted Trinity Broadcasting's motion to consolidate the two actions for all purposes.

2. On April 25, 1986, Judge Cook granted summary judgment in favor of Morrel, Herrold and Shelton. The order sustaining their motion for summary judgment was entered on the docket on April 29, 1986. Subsequently, Trinity Broadcasting filed a motion for rehearing which was denied June 27, 1986.

3. Trinity Broadcasting purported to commence its appeal by filing a notice of appeal on July 23, 1986. No judgment had been rendered terminating the proceedings against Lee R. Eller or Leeco Oil Company, and the action was still pending as to those parties in the trial court.

4. On August 14, 1986, the trial court certified the order as final pursuant to Rule 54(b) of the *Federal Rules of Civil Procedure*, stating that there was no just reason for delay of the appeal. Trinity Broadcasting failed to file a new notice of appeal after the Rule 54(b) order was entered.

5. In its August 26, 1987, opinion, the Tenth Circuit held that a judgment is not final without Rule 54(b) certification where consolidated claims remain to be determined. Because this ruling would deprive the court of jurisdiction in the present matter, however, the court of appeals limited this holding to prospective application only.

6. In their Petition for Rehearing and Suggestion for Rehearing En Banc, Morrel, Herrold and Shelton stated that the prospective limitation of the holding is directly contrary to the ruling of this Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 369 (1981). In *Firestone*, this Court stated:

"By definition, a jurisdictional ruling may never be made prospective only." *Id.* at 379.

7. The Tenth Circuit interpreted *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), as modifying this absolute rule, and so on December 9, 1987, the Petition for Rehearing and Suggestion for Rehearing En Banc were denied.

## REASONS FOR GRANTING THE WRIT

### I.

### The Tenth Circuit has exceeded the jurisdictional limitations of Article III by claiming discretion to waive the finality requirements of Rule 54(b) in order to preserve the appeal.

Through the authority of Article III of the United States Constitution, Congress has determined that the federal courts of appeals shall, with certain narrowly delineated exceptions, have jurisdiction to review only final decisions of the district courts. *See* 12 U.S.C. § 1291. Rule 54(b) of the *Federal Rules of Civil Procedure* limits what orders may be final and appealable. That rule states in pertinent part:

> When more than one claim for relief is presented in an action . . . or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such a determination . . . any order or other form of decision, however designated, . . . shall not terminate the action as to any of the claims or parties.

The issue before the Tenth Circuit below and before this Court on review is whether actions that were initially separate but subsequently consolidated in the trial court constitute "an action" governed by the quoted provision of Rule 54(b). Petitioners herein submit that such consolidated actions are controlled by Rule 54(b), and that the court of appeals is therefore without jurisdiction to review a summary judgment order disposing of one or more but fewer than all claims until such order has been certified as final by the district court.

This is an important jurisdictional issue arising frequently in the circuit courts of appeals. Seven circuits have addressed this issue and have formed three different conclusions. This particular case urgently requires the attention of this Court, because unlike the other circuits which have simply disagreed as to the applicability of Rule 54(b), the Tenth Circuit has held that application of the rule is subject to the "discretion" of the appellate courts.

### A. Separate Actions Consolidated for all Purposes Become "An Action" Governed by Rule 54(b).

Consolidation is governed by Rule 42(a) of the *Federal Rules of Civil Procedure* which provides:

> (a) Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The wording and structure of Rule 42(a) strongly suggest that consolidation is not confined to ordering that all hearings and trial of all issues in the actions be joint, but also permits complete consolidation of the actions themselves. As noted by

the Fifth Circuit in *Ringwald v. Harris*, 675 F.2d 768, 770, n. 4 (5th Cir. 1982), the first clause of the rule does not speak of consolidation; and what it authorizes to be made "joint" is the hearing or trial of any or all of the issues, not the actions themselves: However, under the second clause it is the "actions" which are ordered "consolidated." The third clause authorizes ordering proceedings so as to avoid unnecessary delay or costs. Presumably, the second clause grants some consolidating power not covered by the first and third. *Id.* at 770, n. 4. *See also* 9 Wright & Miller, *Federal Practice & Procedure* § 2382 (1981), for the view that the wording of Rule 42(a) suggests that there are distinctly different kinds of "consolidation."

The language of Rule 42(a) indicates an intent that the district court shall have the authority to consolidate separate actions into "an action" within the meaning of Rule 54(b). This is the most natural interpretation of Rule 42(a) and the one that gives the greatest practical effect to Rule 54(b). This interpretation is also implied by the statement in the advisory committee notes to Rule 42: "For the entry of separate judgments, see Rule 54(b)." *Accord Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982).

### B. The Purposes of Rule 54(b) Will be Thwarted by Failure to Include Consolidated Actions Within its Control.

The original Rule 54(b) provided no guidance as to what constituted a "final order."

> The result was that the jurisdictional time for taking an appeal from a final decision on less than all of the claims in a multiple claims action in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of ap-

pellate proceedings was undesirably increased.

*Sears Roebuck & Company v. Mackey*, 351 U.S. 427, 434 (1956).

The current rule provides a bright line test by which litigants may gauge whether a decision is final for purposes of appeal. This prevents appeals from being lost by a litigant's mistaken belief that the judgment is not final and consequent failure to file a notice of appeal. It also prevents premature filing of a notice of appeal with the consequent waste of the time and resources of the court and the litigants. The current rule also grants the district court right to decide the finality of its own order. Thus, appeal is allowed in appropriate cases but without requiring the circuit court to determine the finality of each order and without disrupting the proceeding in the district court. All of these considerations of Rule 54(b) are as applicable to consolidated actions as to an action containing multiple parties or claims from the outset.

With consolidated cases, however, there is also the additional consideration that the district court, in exercising its broad discretion to order consolidation of actions presenting a common issue of law or fact under Rule 42(a), weighs the saving of time and effort consolidation would produce against any inconvenience, delay, or expense that it would cause. An appeal prior to the conclusion of the entire action could well frustrate the purpose for which the cases were originally consolidated. Not only could it complicate matters in the district court, but it could also cause an unnecessary duplication of efforts in the appellate court.

This should not be construed as hampering a litigant's right to appeal. Rather, it merely delays appeal until the order is final. In those cases where a litigant may be prejudiced by delay, the

district court may certify the order under Rule 54(b) as final for immediate appeal.

### C. Finality Should be Interpreted in a Practical Rather Than a Technical Manner.

This Court has held that the rule of finality must be interpreted in a practical rather than a technical manner. *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949). To hold that an action does not come within Rule 54(b) simply because of the chance fact that the claims were consolidated rather than originally brought together is to determine finality in a highly technical manner. The far more practical interpretation is that the bright line test of Rule 54(b) applies to any action involving multiple claims or parties regardless of the technical manner in which those parties or claims became joined.

This Court has also announced, "Jurisdictional statutes are to be construed 'with precision and with fidelity to the terms for which Congress has expressed its wishes.' " *Palmore v. U.S.*, 411 U.S. 389, 396 (1973), quoting *Cheng Fan Kwok v. INS*, 291 U.S. 206, 212 (1968). In Rule 54(b), Congress has expressed its wish that the determination of whether an order is final be decided by the district court, since it is the district court that is in the best position to make that determination. Congress has further indicated a wish that the time and resources of the appellate courts and the litigants not be wasted pursuing appeals of nonfinal orders. Therefore, Congress designed a bright line test by which such finality could be determined. Congress' objectives should not be thwarted on the ground that a consolidated action may be technically somewhat different than an action with claims joined from the start.

**D. The Language of Johnson v. Manhattan Ry. Co., 289 U.S. 479 (1933), Does Not Apply to the Present Matter.**

In addressing this issue, several circuit courts have considered the statement in *Johnson v. Manhattan Ry. Company*, 289 U.S. 479, 496-97 (1933): "Consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *See, e.g., Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982); *In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 441 (1st Cir. 1972); *Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 929 (7th Cir. 1983).

The Court of Appeals for the Fifth Circuit noted, "*Johnson* predated the rules of civil procedure and the Court did not have before it any issue relating to the finality or completeness required of a judgment as a predicate for appeal. Moreover, the precise nature of the consolidation ordered in *Johnson* is not clear." *Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982). *Accord Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 929, n. 1 (7th Cir. 1983).

While a consolidation may not in every respect merge separate actions into a single suit, there is no reason why a proper consolidation may not cause otherwise separate actions to thenceforth be treated as a single judicial unit for purposes of Rule 54(b) when the consolidation is, as in the present case, for all purposes, requested by the plaintiff, and the actions could have originally been brought in a single suit. *Accord Ringwald v. Harris*, 675 F.2d 678, 771 (5th Cir. 1982).

## II.

**The nation's Courts of Appeals are sharply divided into three main groups over the important and frequently recurring jurisdictional question of the finality of a judgment on one of a group of consolidated claims.**

The question of whether a judgment in a consolidated action that does not dispose of all claims may be final without certification pursuant to Rule 54(b) of the *Federal Rules of Civil Procedure* has proven to be an uncommonly controversial issue. The seven circuit courts of appeals which have addressed this issue have divided into three main groups with sharply differing conclusions. The first group consists of those circuits which have concluded that each of the consolidated cases is a separate action and, therefore, a judgment in one of the actions is necessarily a final judgment appealable without a Rule 54(b) certification. This position has been adopted by the First and Sixth Circuits. *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439, 442 (1st Cir. 1972); *Accord Kraft, Inc. v. Local Union 327, Teamsters*, 683 F.2d 131, 133 (6th Cir. 1982). This is also the position implicitly adopted by the Tenth Circuit in its opinion in the present case.

Taking the opposite view is the Ninth Circuit which has concluded that a judgment in any consolidated action is *never* final without Rule 54(b) certification where claims remain pending in the trial court. *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984).

The third group falls within these two extremes. The position adopted by the Third, Fifth and Seventh Circuits is that the court of appeals should consider the extent and purpose of the consolidation and the relationship of the consolidated actions to determine the applicability of Rule 54(b). *See Ivanov-McPhee v. Washington Nat. Ins. Co.*, 719 F.2d 927, 930 (7th Cir. 1983);

*Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982); *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir. 1971).

Although the circuit courts are divided three ways on this issue, only those circuits adhering to the extreme position that Rule 54(b) has no bearing on a consolidated action would assert jurisdiction to review an order such as that in the present case. In the present case, the claims were all brought by a single plaintiff. That plaintiff could have brought all the claims in one action but failed to do so. On the plaintiff's own motion, the district court consolidated the actions for all purposes. Thus, even those courts somewhere in between the two extremes would find that Rule 54(b) operates to bar the appeal in the present matter.

Petitioners submit that there are few issues more central to the concept of the limited jurisdiction of the federal courts than the issue here presented before this Court. The fact that seven courts of appeals are almost equally divided over such a significant constitutional issue as finality indicates that this is a subject urgently requiring review by this Court.

## III.

## The decision of the Tenth Circuit is directly contrary to the ruling of this Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 369 (1981).

In its original opinion, *Trinity Broadcasting Corp. v. Eller*, 827 F.2d 673 (10th Cir. 1987) ("*Trinity I*"), the court stated:

> We agree with the Ninth Circuit's approach and adopt the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final appealable judgment under 28 U.S.C. § 1291. To obtain review of one part of a consolidated action, ap-

> pellant must obtain certification under Fed. R. Civ. P. 54(b).

*Id.* at 675.

The court next announced, however:

> Since plaintiff did not file a second notice of appeal following the district court's Rule 54(b) certification, our dismissal of this appeal would result in no hearing for plaintiff on the merits. Retroactive application of this rule thus would work a substantial inequity on the plaintiff. We decline to do so.

*Id.*

This was challenged in a Petition for Rehearing and Suggestion for Rehearing En Banc as limiting a jurisdictional ruling to prospective application only in violation of this Court's holding in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981). In *Firestone*, the United States Court of Appeals for the Eighth Circuit had held that orders denying motions to disqualify counsel are not appealable final decisions. Because it was overruling prior cases, however, the Eighth Circuit made its decision prospective only and reached the merits of the challenged order. The Supreme Court reversed, finding that the Eighth Circuit was correct in its finding that there was no appealable final order, but that the Eighth Circuit could not limit its holding to prospective cases only. The Court said:

> This approach, however, overlooks the fact that the finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.

*Id.* at 379.

In its opinion on the Petition for Rehearing and Suggestion for Rehearing En Banc, the Tenth Circuit stated that *Firestone* was not applicable because the decision in the present case was merely a "prudential holding" "far from being 'jurisdictional' and subject to Article III limitations." *Trinity Broadcasting v. Eller*, 835 F.2d 245, 248 (10th Cir. 1987) ("*Trinity II*"). After noting that the district court has the power to determine finality, the court stated:

> The courts of appeal likewise enjoy the power to establish and apply flexible rules of finality. Such power is exemplified by three decisions cited in *Trinity I* in which other circuits contemplated the finality of partial summary orders in consolidated cases. *Ivanov-McPhee v. Washington National Insurance Co.*, 719 F.2d 927, 930 (7th Cir. 1983); *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982); *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir. 1971).

*Id.*

In sum, the opinion of the Tenth Circuit is that it has "discretionary power over finality determinations," so that its decision is nothing more than "rulemaking" for the circuit. *Id.*

This betrays a fundamental misunderstanding of both the finality requirement and the nature of the cited circuit court opinions. Contrary to the position of the Tenth Circuit, no court, not even the district court, has the discretion to create finality. The district courts are not empowered to grant Rule 54(b) certification to those orders that are not inherently final. Thus, the district court, while enjoying some measure of discretion, does not have discretion to create finality.

The circuit courts are even more limited since finality is a direct limitation upon their jurisdiction. The circuit opinions

cited by the Tenth Circuit do not, as suggested, retain some "discretionary power over finality determinations." In *Ringwald*, the Fifth Circuit flatly states that Rule 54(b) applies to those actions which, like the present action, could have been brought at one time. Similarly, the Third Circuit in *Den Norske* found that Rule 54(b) does not apply where the actions are *not* consolidated for all purposes, but only for trial. Neither of these courts reserve for themselves any discretionary power to create finality according to their sympathies for the litigants. The Seventh Circuit in *Ivanov-McPhee* does state that it will consider whether "the appellant's interests will be seriously undermined by dismissal of the appeal," but this is mere dicta since the court found that Rule 54(b) did apply, and it was therefore without jurisdiction. 719 F.2d at 930.

The Tenth Circuit also announces that it "cannot accept the absolute language of *Firestone* as applicable to all rulings concerning jurisdiction." 835 F.2d at 246. This, the court reasoned, is because, "The Court in *Marathon*, when faced with more compelling facts, retreated from an absolute prohibition against prospective jurisdictional holdings." *Id.* at 247 (citing *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982)). This reasoning overlooks the fact that the bankruptcy courts in *Marathon* were not without jurisdiction, but rather, the congressional grant of jurisdiction did not comply with Article III requirements. *Marathon* is not a jurisdictional ruling, but constitutional. Therefore, *Firestone* has no application to *Marathon* and cannot be deemed to be modified by *Marathon*.

*Firestone* is directly on point with the present case and expressly prohibits the actions of the circuit court of appeals. The Tenth Circuit's claim that it is merely "rulemaking" trivializes the jurisdictional nature of the finality requirement and at-

tempts to circumvent the fundamental principle that no court may hear a case over which it lacks subject matter jurisdiction.

## CONCLUSION

The issue of the finality of orders in consolidated actions is a recurring question over which the circuit courts have divided three ways. The decision of the Tenth Circuit challenges several fundamental constitutional principles. The court asserts that finality is "discretionary," that a lack of subject matter jurisdiction may be outweighed by prudential concerns, and that jurisdictional rulings may be applied prospectively only. Furthermore, the court has directly defied the mandate of *Firestone*. For these reasons, a Writ of Certiorari should issue to the Tenth Circuit Court of Appeals so that this Court may properly address this jurisdictional issue.

Respectfully submitted,

SNEED, LANG, ADAMS,
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By _____

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## APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

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FILED
United States Court of Appeals
Tenth Circuit
AUG 26 1987
ROBERT L. HOECKER
Clerk

**No. 86-2118**

TRINITY BROADCASTING CORPORATION,
a Michigan corporation
Plaintiff-Appellant

*v.*

LEE R. ELLER; LEECO OIL,
an Oklahoma corporation
Defendants

REECE MORREL; DONALD HERROLD;
and J. CHARLES SHELTON,
Defendants-Appellees

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**Appeal from the United States District Court**
**for the Northern District of Oklahoma**
**(D.C. No. 82-C-1188)**
**(Consolidated)**

---

Submitted on the briefs:

Steven J. Berg of Briggs, Patterson, Eaton & Berg, Tulsa, Oklahoma, for Plaintiff-Appellant.

James C. Lang, Brian S. Gaskill, and Melinda J. Martin of Sneed, Lang, Adams, Hamilton, Downie & Barnett, Tulsa, Oklahoma, for Defendants-Appellees.

Before LOGAN and TACHA, Circuit Judges, and O'CONNOR, District Judge.*

PER CURIAM.

*The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

After examinging the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Cir. R. 34.1.8(c) and 27.1.2. The cause is therefore ordered submitted without oral argument.

On July 23, 1986, plaintiff filed a notice of appeal from the district court's entry of summary judgment in favor of some defendants, as well as from the denial of plaintiff's motion for reconsideration. Plaintiff's claims against two additional defendants in an action consolidated with the instant action remained pending. On August 14, 1986, the district court entered an order pursuant to Fed. R. Civ. P. 54(b) finding that there was no just reason for delay and determining that the summary judgment in the instant action was a final judgment. Plaintiff did not file a new notice of appeal.

We consider in this case an issue of first impression in this circuit, whether summary judgment in favor of the defendants in an original action operates as a final judgment when plaintiff's claims against defendants in another action which had been consolidated with the first are still pending. The matter is before us on our own motion, to determine whether this court has jurisdiction over the captioned appeal.

The Ninth Circuit has adopted an absolute rule that a judgment in a consolidated action that does not dispose of all claims is not final without a Rule 54(b) certification. *See Huene v. United States*, 743 F.2d 703 (9th Cir. 1984). Two other circuits have held that a judgment in one portion of a consolidated action is final and appealable regardless of the pendency of the other consolidated claims. *See In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir. 1972); *Kraft, Inc. v. Local Union 327, Teamsters*, 683 F.2d 131 (6th Cir. 1982). In contrast, other circuits have looked at the nature of the consolidation and the relationship of the consolidated actions. *Ivanov-McPhee v. Washington Nat'l. Ins. Co.*, 719 F.2d 927, 930 (7th Cir. 1983); *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982); *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir. 1971).

We agree with the Ninth Circuit's approach, and adopt the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291. To obtain review of one part of a consolidated action, appellant must obtain certification under Fed. R. Civ. P. 54(b). In this circuit, Rule 54(b) certification must precede filing of the notice of appeal. *See A.O. Smith Corp. v. Sims Consolidated Ltd.*, 647 F.2d 118, 121 (10th Cir. 1981); *but see Freeman v. Hittle*, 747 F.2d 1299, 1301 (9th Cir. 1984).

Our adoption of any other rule would lead to the same piecemeal review Rule 54(b) seeks to prevent. We reject the flexible approach of considering the nature of the consolidation in each individual case because "it is essential that the point at which a judgment is final be crystal clear because appellate rights depend upon it." *Huene*, 743 F.2d at 704. Moreover, the flexible approach makes the appellate court the arbiter of the

nature and purpose of consolidation, rather than the district court. The district court "is best able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that purpose." *Id.*

We enunciate here a new rule for this circuit, in the context of differing rules in other circuits. Since plaintiff did not file a second notice of appeal following the district court's Rule 54(b) certification, our dismissal of this appeal would result in no hearing for plaintiff on the merits. Retroactive application of this rule thus would work a substantial inequity on the plaintiff. We decline to do so. *See Thomas v. Metroflight, Inc.*, 814 F.2d 1506, 1512 (10th Cir. 1987); *EEOC v. Gaddis*, 733 F.2d 1373, 1376 (10th Cir. 1984). Therefore, the district court's entry of summary judgment against plaintiff in the instant case will be considered final on the date it was entered. The plaintiff's timely notice of appeal from the district court's entry of summary judgment therefore confers appellate jurisdiction.

The appellant is directed to file his opening brief within thirty days of the date of this opinion.

## APPENDIX B

## No. 86-2118

United States Court of Appeals,
Tenth Circuit.

Dec. 9, 1987.

**TRINITY BROADCASTING CORPORATION,**
**Plaintiff-Appellant**

*v.*

**LEE R. ELLER; LEECO OIL,**
**an Oklahoma corporation**
**Defendants**

**REECE MORREL, DONALD HERROLD;**
**and J. CHARLES SHELTON**
**Defendants-Appellees**

Broadcasting corporation filed suit. Claims against two additional defendants were consolidated. The United States District Court for the Northern District of Oklahoma, H. Dale Cook, Chief Judge, entered summary judgment in favor of some defendants and denied broadcasting corporation's motion for reconsideration. Corporation filed notice of appeal. The Court of Appeals, 827 F.2d 673, held that judgment in consolidated action that did not dispose of all claims did not operate as final appealable judgment and that new rule was not retroactive. Defendants petitioned for rehearing with suggestion for rehearing en banc. The Court of Appeals, Logan, Circuit Judge, held that Court of Appeals' decision to hear appeal despite its decision that summary judgment was not appealable was not unlawful usurpation of congressional control over jurisdiction of inferior federal courts.

Rehearing and rehearing en banc denied.

Clark O. Brewster and Michael F. Kuzow of Brewster Shallcross Rizley & Mullon, Tulsa, Okl., for plaintiff-appellant.

James C. Lang, Brian S. Gaskill, Melinda J. Martin and Kirsten I. Bernhardt of Sneed, Lang, Adams, Hamilton & Barnett, Tulsa, Okl., for defendants-appellees.

Before LOGAN and TACHA, Circuit Judges, and O'CONNOR, District Judge.*

LOGAN, Circuit Judge.

Defendants-appellees Reece Morrell, Donald Herrold and J. Charles Shelton have petitioned for rehearing, with suggestion for rehearing en banc, of our decision in *Trinity Broadcasting Corporation v. Eller,* 827 F.2d 673 (10th Cir. 1987) (*Trinity I*). We there ruled that when independently filed actions have been consolidated for trial, an order of summary judgment disposing of one, but not all, of the claims or suits is not appealable unless and until the district court has certified the order as final pursuant to Fed.R.Civ.P. 54(b). In so holding we followed one among several conflicting interpretations of other circuits on the same issue. *See* 827 F.2d at 675. To avoid an unfairly harsh application, we declined to apply the rule retroactively to bar plaintiff-appellant Trinity Broadcasting Corporation's appeal. Instead, we held that "the district court's entry of summary judgment against plaintiff in the instant case will be considered final on the date it was entered." *Id.* We therefore found appellate jurisdiction and ordered the appeal to proceed.

Appellees urge us to reconsider that decision. They contend that our decision to hear the appeal would broaden the congressional grant of jurisdiction over appeals from the final decisions of district courts, 28 U.S.C. § 1291, and would contravene the

*The Honorable Earl E. O'Connor, Chief Judge, United States District Court for the District of Kansas, sitting by designation.

notion of limited jurisdiction in the inferior federal courts embodied in Article III of the United States Constitiution.

Appellees' argument relies principally upon language in *Firestone Tire & Rubber Co. v. Risjord,* 449 U.S. 368, 101 S.Ct. 669, 66 L.Ed.2d 571 (1981). There, the Eighth Circuit had held that the denial of a motion to disqualify counsel did not constitute a final decision for purposes of 28 U.S.C. § 1291, but that the equities of the case—primarily that the holding overruled clear precedent—required a prospective application only. *In re Multi-Piece Rim Products Liability Litigation,* 612 F.2d 377, 379 (8th Cir.1980) (en banc), *rev'd sub nom. Firestone, supra.* In reversing, the Supreme Court stated:

> "[The Circuit's] approach, however, overlooks the fact that the finality requirement embodied in § 1291 is jurisdictional in nature. If the appellate court finds that the order from which a party seeks to appeal does not fall within the statute, its inquiry is over. *A court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only.*"

*Firestone*, 449 U.S. at 379, 101 S.Ct. at 676 (emphasis added). We make a two-part response to the appellees' argument.

I

First, we cannot accept the absolute language of *Firestone* as applicable to all rulings concerning jurisdiction. In a post-*Firestone* opinion, *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), the Supreme Court, considered equitable factors in determining whether to apply prospectively a holding that Congress had vested jurisdiction in bankruptcy courts in violation of Article III. *Id.* at 87-88, 102 S.Ct. at 2880 (plurality

opinion; *see also* concurring opinion of Rehnquist, J., *id.* at 92, 102 S.Ct. at 2882).[1] Marathon did not mention *Firestone*. The critical distinguishing factor between the two cases might be the factual settings. In *Firestone* the Court's decision did not foreclose appeal, but merely delayed it until the lower court's disposition of the entire case, as the Supreme Court itself emphasized. 449 U.S. at 377-78, 101 S.Ct. at 675-76. The Court in *Marathon*, when faced with more compelling facts, retreated from an absolute prohibition against prospective jurisdictional holdings.

[1] *Marathon* implicitly recognizes a staple of Article III interpretation: Article III's jurisdictional limitation must be construed in light of all the competing constitutional and prudential values in a case. *Marathon* found the interests of congressional intent and judicial administration to have temporarily coequal status with subject matter jurisdiction. *See also Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 376-77, 60 S.Ct. 317, 319-20, 84 L.Ed. 329 (1940) (need for finality bars collateral attack on erroneous jurisdictional ruling of federal court). The case before us invokes the litigant's interest in fair notice of rules which affect the conduct of a lawsuit—an interest which is protected by the Due Process Clause if a lack of notice deprives a party of its day in court. *Brinkerhoff-Faris Trust & Savings Co. v Hill,* 281 U.S. 673, 679-80, 50 S.Ct. 451, 453-54, 74 L.Ed. 1107 (1930).

*Marathon* looks to Chevron Oil Co. v. Huson, 404 U.S. 97, 106-07, 92 S.Ct. 349, 355-56, 30 L.Ed.2d 296 (1971), for a mechanism to balance jurisdictional consistency with competing values. *Chevron* sets forth

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[1] In fact, the Supreme Court decided *Marathon* in June but delayed the application of its jurisdictional holding until October. Thus, the Court not only gave its ruling a nonretroactive effect but also delayed the prospective effect.

> "three considerations recognized by our precedents as properly bearing upon the issue of retroactivity. They are, first, whether the holding in question 'decide[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases; second, 'whether retrospective operation will further or retard [the] operation' of the holding in question; and third, whether retroactive application 'could produce substantial inequitable results' in individual cases."

*Marathon*, 458 U.S. at 88, 102 S.Ct. at 2880 (citations omitted). These considerations justify the nonretroactive application of our ruling in *Trinity I*. First, the finality of partial summary judgment in consolidated cases arose in *Trinity I*. as an issue of first impression in this circuit. Our holding was not clearly foreshadowed, insofar as the majority of circuits which had faced the issue had reached a result more sympathetic to an appellant than our holding. *See Trinity I*, 827 F.2d at 675 (discussing precedent from other circuits). Second, a retroactive holding which bars the appeal would defeat one of the primary purposes of the federal rules of civil and appellate procedure: the orderly presentation of appeals in an environment free of procedural complexity, confusion, and surprise. Finally, that appellant would lose its appeal forever[2] satisfies, by itself, *Huson*'s objective to avoid "substantial inequitable results."

II

[2] Appellees' argument also erroneously assumes that the courts have no discretion in determining "finality" for purposes

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[2] Trinity did not file a second notice of appeal following the district court's Rule 54(b) certification. If we treat the Rule 54(b) certification as making the judgment "final" within the meaning of 28 U.S.C. § 1291, the ten-day period for filing notices of appeal having expired, *see* Fed.R.App.P. 4(a)(1), Trinity will have lost its right to appeal unless we uphold the validity of the first notice of appeal.

of appellate jurisdiction. The law is to the contrary, particularly in the context of review during litigation that is ongoing. For instance, the district court, by its certification process pursuant to Fed.R.Civ.P. 54(b), can choose in a given case to create a "final" order which we must accept for review. Conversely, the district court may delay review of that order until the entire controversy is decided, by denying Rule 54(b) certification. Rule 54(b) assigns to the district court the duty to weigh "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Consversion Corp.*, 338 U.S. 507, 511, 70 S.Ct. 322, 324, 94 L.Ed. 299 (1950).

The courts of appeal likewise enjoy the power to establish and apply flexible rules of finality. Such power is exemplified by three decisions cited in *Trinity I*, in which other circuits contemplated the finality of partial summary judgment orders in consolidated cases. *Ivanov-McPhee v. Washington National Insurance Co.*, 719 F.2d 927, 930 (7th Cir.1983); *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir.1982); *Jones v. Den Norske Amerikalinje A/S*, 451 F.2d 985, 986-87 (3d Cir.1971). All three of these circuits decided that the finality of such orders must be determined on a case-by-case basis, taking into account the nature of the consolidation and the relationship of the consolidated actions. Thus, these three circuits have reserved for themselves the type of discretionary power over finality determinations which we, in *Trinity I*, ceded prospectively to the district courts to be exercised pursuant to Rule 54(b) certification.

[3] We have no doubt of the legality of the Third, Fifth and Seventh Circuits' approach. The need for a flexible interpretation of § 1291's rule of finality was recognized in *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 85 S.Ct. 308, 13

L.Ed. 2d 199 (1964), in which the Supreme Court held that the "requirement of finality is to be given a 'practical rather than a technical construction.' " *Id.* at 152, 85 S.Ct. at 311 (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949)). This is not to say that these other circuits' decisions are the wisest approach; in *Trinity I* we decided that for reasons of judicial economy, determinations of finality in these cases should remain the sole province of district courts. But *Trinity I* was a prudential holding, not mandated by precedent in the Supreme Court or our circuit, by statute, or by the Constitution. From this recognition flows a fair rebuttal to appellees' argument: Because, like the other circuits, we could have exercised on an ongoing basis the power to determine the finality of a grant of summary judgment in one of multiple consolidated cases, we can exercise such power on a one-time basis before permanently assigning such power to the district courts on an exclusive basis.

[4] Far from being "jurisdictional" and subject to Article III limitations, the decision whether to hear the appeal in the circumstances before us is for this court to determine subject only to the overriding authority of the Supreme Court or Congress. Thus, we do not see our ruling as an unlawful usurpation of Congress' control over the jurisdiction of inferior federal courts as expressed in 28 U.S.C. § 1291. *Cf. Campos v. LeFevre,* 825 F.2d 671, 676 (2d Cir.1987) (giving prospective-only effect to new practice of dismissing untimely appeals when no motion for extension of time has been filed under Fed.R.App.P. 4(a)). Rather, we are exercising a prudential and constitutional measure of discretion over the retroactive impact of our new holding, so that technical barriers will not deprive appellant of its appeal. We adhere to our decision in *Trinity I.*

The petition for rehearing is DENIED by the panel to whom the case was argued and submitted. Because no member of the panel nor judge in regular active service on the court has requested that the court be polled on rehearing en banc, *see* Fed.R.App. P. 35(b), the suggestion for rehearing en banc is DENIED.

**APPENDIX C**

# UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OKLAHOMA

CLERK'S OFFICE

UNITED STATES COURT HOUSE

TULSA, OKLAHOMA 74103

JACK C. SILVER
CLERK

August 15, 1986

(918) 581-7796
(FTS) 736-7796

TO: COUNSEL/PARTIES OF RECORD

RE: Case # 83-C-1188
Trinity Broadcasting Corp. vs. Reece Morrel, Donald Herrold and J. Charles Shelton

This is to advise you that Chief Judge H. Dale Cook entered the following Minute Order this date in the above case:

> On April 25, 1986 this Court entered its Order sustaining defendants Morrel, Herrold, and Shelton's motion for summary judgment and entered Judgment in their favor. Pursuant to Rule 54(b) F.R.Cv.P. the Court finds that there is no just reason for delay and the Court determines that the Judgment entered on April 25, 1986 in favor of defendants Morrel, Herrold, and Shelton and against Trinity Broadcasting Corp. is a final judgment.

Very truly yours,

JACK C. SILVER, CLERK

By: S/S P. Irving
Deputy Clerk

# APPENDIX D

## CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

Rule 54(b) of the *Federal Rules of Civil Procedure* provides:

**(b) Judgment upon multiple claims or involving multiple parties**

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 42(a) of the *Federal Rules of Civil Procedure* provides:

**(a) Consolidation.** When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

No. 87-1481

In The

# Supreme Court of the United States

October Term, 1987

REECE MORREL,
DONALD HERROLD,

and

J. CHARLES SHELTON,

*Petitioners,*

vs.

TRINITY BROADCASTING CORP.,
a Michigan corporation,

*Respondent.*

**On Petition for a Writ of Pre-Judgment Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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June, 1988

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## QUESTIONS PRESENTED

1. Does the instant Petition for *Pre-Judgment* Writ of Certiorari involve or present any question or issue "of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement by this Court," as required by Supreme Court Rule 18?

2. Is it in the interests of the orderly administration of justice, or of judicial economy, for the Petitioner to seek interlocutory review in the Supreme Court *after* allowing the substantive merits of the appeal below to be fully briefed in the Tenth Circuit?

3. Do the interlocutory decisions herein by the U.S. Court of Appeals for the Tenth Circuit merit the Supreme Court's attention at this juncture?

In the event that this Petition is granted, Respondent would urge that the scope of the "Questions Presented" be broadened to include at least the following:

4. When does an otherwise final decision in a case which has been consolidated with other cases become "final" for appeal purposes?

5. In a case certified by a District Court for an immediate or interlocutory appeal, is it fatal to the appeal that the certification may have been entered after the docketing of the appeal, or may such certification be taken as *nunc pro tunc?*

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No. 87-1481

In The

# Supreme Court of the United States

October Term, 1987

REECE MORREL,
DONALD HERROLD,

and

J. CHARLES SHELTON,
*Petitioners,*

vs.

TRINITY BROADCASTING CORP.,
a Michigan corporation,
*Respondent.*[1]

**On Petition for a Writ of Pre-Judgment Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COMES NOW Respondent, TRINITY BROADCASTING CORP., a Michigan corporation,[2] and respectfully

[1] This caption lists all Parties to this Certiorari action in the Supreme Court.

[2] Trinity Broadcasting Corp. has no corporate parents, affiliates or subsidiaries.

urge that the Supreme Court deny a Writ of Certiorari herein, for the reasons which follow.

—o—

## RESTATEMENT OF THE CASE

The "Statement of the Case" in the Petition for Certiorari herein totally glosses over the central fact that the Petitioners seek *pre-judgment review* of the interlocutory decision(s) by the U.S. Court of Appeals for the Tenth Circuit, where the substantive merits of the Appeal now pending therein have been fully briefed and are awaiting oral argument and decision. That is, the two decisions by the Tenth Circuit assailed herein were *not* on the actual merits of that Appeal (10th Cir., No. 86-2118), but rather, were only on certain details of appellate practice, and in more particular, on the minutiae of the required docketing sequence in a consolidated case certified by the District Court for an immediate appeal [see Federal Rule 54(b) and 28 U.S.C. 1292(b)].

In truth, there does appear to be some disagreement between the Circuits on one of the narrow questions impliedly presented in the instant Petition—and it was undoubtedly for that conflict that the Tenth Circuit, while agreeing in the abstract with the Petitioners (Appellees below), nevertheless decided not to penalize the Respondent (Appellant below) with a *retroactive* application of the Ninth Circuit's view of the matter, which the Tenth Circuit did adopt herein and will apply to all such future cases.

The underlying substantive merits of this lawsuit are as follows: The Respondent, Trinity Broadcasting Corp., Plaintiff in the U.S. District Court for the Northern District of Oklahoma, first sued (in Case No. 82-C-1188-C, filed on December 12, 1982) one Leeco Oil Company, Inc., and its principal, a Mr. Lee Eller, for certain violations of the Oklahoma "Blue Sky" [Securities] Act, 71 Okla. Stat. 101 et seq, to recover the purchase money (One Million Dollars) paid by Trinity for Trinity's acquisition of an unregistered security, to wit: shares in an oil and gas limited partnership sold by Leeco and Mr. Eller. Later, Trinity also sued (in Northern District of Oklahoma Case No. 83-C-642-C, filed on July 25, 1983), the instant Petitioners, Messrs. Reece Morrel, Donald Herrold and J. Charles Shelton, who happen to be attorneys practicing law in Tulsa, Oklahoma, for essentially the same relief, based on their double involvement in that securities violation: first, as the attorneys who drew up the papers creating the unregistered limited partnership (a "security" required to be registered under Oklahoma law, 71 Okla. Stat., Secs. 2(20)(R), 2(20)(K), and 2(20)(P)), and second, as indirect vendors (through Leeco and Mr. Eller) of *their own* "oil patch" properties to Trinity. These two cases were consolidated by the District Court on December 5, 1983.

The real question, then, is whether, under 71 Okla. Stat. 408(b) [reproduced at Appendix A hereto], Messrs. Morrel, Herrold and Shelton fall within the terms "Every person who materially participates or aids in a sale or purchase [of an unregistered security] . . . or who directly or indirectly controls any person [who sells an unregistered security] . . ." If Messrs. Morrell, Herrold and Shelton

do come within the foregoing definition, then Trinity can recover the One Million Dollars that it paid for the essentially worthless oil properties which it acquired from the Petitioners. If the Petitioners do not come within the foregoing definitions, then they are "home free."

The foregoing 71 Okla.Stat. 408(b) has never been construed by the Oklahoma Supreme Court.[3] There is some Federal authority to the effect that a lawyer who is only involved in the sale of unregistered securities to the extent of merely preparing the documents involved is not liable as a "seller" under Section 771 of the [Federal] Securities Act of 1933 (15 U.S.C. 771). However, there is also authority, from other States, construing "Blue Sky" statutes very similar to Oklahoma's, to the effect that attorneys who go beyond the mere scrivening of legal documents can indeed be held liable as "materially participating and aiding" in such sales, or "directly or indirectly controlling" the sellers. See *Adams v. American Western Securities, Inc.* (Ore., 1973) 510 P.2d 838, 841; *Black & Co. v. Nova Tech, Inc.* (D.Ore., 1971) 333 F.Supp. 468, 472 (construing Oregon law); see also *Cola v. Terzano* (1984) 129 N.J.Super. 47, 322 A.2d 195, 199.

As it turned out, the District Court entered summary judgment in favor of Messrs. Morrel, Herrold and Shelton. Therefore, Trinity appealed to the Tenth Circuit, and the District Court certified its decision for immediate appeal. In the Court of Appeals, Trinity is naturally urging first, that the District Court overlooked the Petitioners'

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[3] A motion to certify the interpretation of the never-construed 71 Okla.Stat. 408(b) to the Oklahoma Supreme Court, under the Oklahoma Certification of Questions of Law Act, 20 Okla.Stat. 1601 et seq., is pending in the Tenth Circuit.

involvement in the transactions at bar above and beyond that as mere legal scriveners (i.e., they succeeded in unloading their own worthless oil properties on Trinity through the very limited partnership that they had drawn up!); second, that the District Court erroneously followed the Federal decisions construing "sellers" rather than State decisions construing "material participators and aiders" and the like; and third, that these issues should be resolved by full trial on the merits, rather than by summary judgment.

However, there is some authority to the effect that Trinity's previous attorneys got their docketing sequence for appeal somewhat out of order, to the effect that the District Court should have certified the appeal first, and then Trinity should have appealed. Hence, the Court of Appeals' inquiry re the docketing herein, which inquiry has led to the Tenth Circuit's decision(s) assailed herein, entertaining Trinity's appeal in *this* instance, but with an opposite rule to apply in future appeals.

With this extremely narrow scope of the interlocutory decision(s) herein in focus, let us now turn to the immediate question of whether the Supreme Court should or should not assume yet further interlocutory appellate jurisdiction herein.

———o———

## REASONS FOR NOT GRANTING THE WRIT

### I. Supreme Court Rule 18

Supreme Court Rule 18 says that pre-judgment certiorari to a United States Court of Appeals "will be

granted only upon a showing that the case is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." The cases cited by the Supreme Court itself as illustrative of the Rule 18 standard overwhelmingly demonstrate that *this case* falls *toto caelo* short of that extreme standard. This is especially so as this case involves neither Constitutional issues, separation-of-power issues, nor life-and-death issues or the like. In fact, given the Tenth Circuit's cautionary pronouncement that the result of its interlocutory decision(s) will apply *in this case only* (i.e., the *legal* decision will be applied prospectively only, to future cases), it is difficult to perceive any *public* importance or even interest in the interlocutory decision(s) assailed herein, beyond, of course, that of these particular litigants themselves.

Therefore, Certiorari should be denied.

## II. Delay in Petitioning

Further underscoring the underwhelming importance of this case, or of any "emergency" need for immediate review by the Supreme Court, is the fact that the Petitioners themselves delayed filing their instant Petition until *after* the principal briefs on the substantive merits had already been filed in the Court of Appeals.[4] In fact, the Petitioners did not even *ask* the Tenth Circuit to allow the Parties to defer submitting their substantive briefs pend-

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[4] Trinity's Brief-in-Chief on the merits was filed in the Tenth Circuit on February 10, 1988; the Answer Brief was filed on March 6, 1988; and the Reply Brief was filed on April 8, 1988. This instant Petition for Certiorari was not docketed in the Supreme Court until March 7, 1988.

ing the filing and disposition of this Petition. Thus, the Petitioners sat back and allowed the Respondent (Appellant below) to go to the considerable expense and effort of preparing its principal brief before the Petitioners even indicated that they were contemplating an "end run" to the Supreme Court.

Therefore, Certiorari should be denied for the Petitioners' own conspicuous lack of diligence in filing their instant Petition.

### III. Availability of Later Review

The Petitioners cite absolutely no reason whatsoever why the alleged jurisdictional issues urged herein cannot simply be preserved for later presentation to the Supreme Court after the Tenth Circiut's decision on the merits—which have been fully briefed. Indeed, if the Petitioners should win on those merits before the Court of Appeals, that might very well moot or otherwise obviate *any* need for review by the Supreme Court. And this is especially so since, as noted above, the Petitioners deferred filing their instant Petition until *after* the principal briefs on the merits had already been filed before the Circuit.

No interim or permanent injunctive relief is involved in this case, and if the Tenth Circuit should reverse the District Court's grant of summary judgment for the Petitioners (Appellees and Defendants below), the impact of that decision would be not to subject the Petitioners to any immediate or crushing monetary judgment, but rather, merely to direct the District Court to hold a trial—which the Petitioners (Defendants) might ultimately win—or which, if they should lose, they could then appeal from, and perhaps prevail on in the Court of Appeals without ever hav-

ing to petition the Supreme Court for relief. Even if, after all this, the Petitioner should yet lose, the Petitioners would still be at liberty *then* to seek review by the Supreme Court, in the context of a fully-litigated and *final* judgment.

### IV. The Issues Assertedly Involved are not Clearly Presented

The Petitioners make much of a minor conflict as to when certain judgments, in consolidated cases, become "final" for purposes of conventional, direct appeals. However, in this case, the District Judge certified his summary judgment decision for immediate review. Federal Rule 54(b); cf. 28 U.S.C. 1292(b).

The immediate and interlocutory nature of the decision(s) herein aside, a Supreme Court affirmance of the Ninth Circuit approach adopted prospectively by the Tenth Circuit (see 827 F.2d at 675) herein—that a decision in one consolidated case is not "final" for appeal purposes until *all* the consolidated cases are disposed of—would only result in a ruling that normally such an appeal as the one below may be dismissed for prematurity, and without prejudice to refiling when *all* the consolidated cases are decided. [However, since the Tenth Circuit had never so held, and since Trinity might not have been able to accomplish a refiled appeal in this case in the face of a retroactive application of the Tenth Circuit's adoption of the Ninth Circuit's ruling herein,[5] the Court of Appeals

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[5] Proceedings in the other consolidated District Court case herein, against Leeco and Eller, were stayed on July 2, 1986, because of those defendants' bankruptcy. Once that consolidated

(Continued on following page)

very properly made its decision(s) herein prospective only.]

Or, if the Supreme Court should opt for the First and Sixth Circuit approach (also outlined in the first decision below (827 F.2d at 675)—which approach was rejected by the Tenth Circuit herein—then such a Supreme Court ruling would mean that the District Court's summary judgment herein *was* indeed final for appeal purposes, and there was no need for the District Court to have certified an immediate or interlocutory appeal herein.

Of if the Supreme Court should adopt the position of the Third, Fifth, and Seventh Circuits (again see 827 F.2d at 675), that finality depends on the circumstances, then such a Supreme Court ruling would only result in a remand to the Tenth Circuit for further proceedings.

Or, finally, if the Supreme Court should conclude that a District Court's certification of an order for immediate or interlocutory appeal can operate *nunc pro tunc*, then

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(Continued from previous page)

case (N.D.Okla., No. 82-C-1188-C) should ever be finally decided, then, perhaps, Trinity could refile its appeal herein as a consolidated appeal from *both* District Court cases. Thus, it may not be strictly true, as the Tenth Circuit feared, that a retroactive application of the Ninth Circuit rule herein would have left Trinity with *no* appellate remedy against Messrs. Morrel, Herrold and Shelton—but such a retroactivity would certainly delay immensely a refiled appeal, as the consolidated case against Leeco and Eller is *still* stayed.

Under this analysis, then, a Supreme Court reversal would in effect delay, but not deny, Trinity's appeal against the instant Petitioners (Morrel, Herrold and Shelton)—an eventuality which could render a Supreme Court intervention herein ultimately nugatory except as to the dilatory abstraction presented.

such a Supreme Court ruling would mean that Trinity's appeal was properly docketed irrespective of the foregoing disagreement between the Circuits.

All this, coupled with the prospective nature of the Tenth Circuit's precise ruling herein, militates to deprive any Supreme Court decision which might be rendered herein of having much, perhaps any, precedential effect or value. That is always a prime basis for denying Certiorari.

———o———

## CONCLUSION

The substantive issue before the District Court is, simply, whether the involvement of Messrs. Morrel, Herrold and Shelton in unloading their worthless oil properties on Trinity through the mechanism of an unregistered limited partnership is excused, under 71 Okla.Stat. 408(b), by the mere fact that, as attorneys, they possessed the skill to draft, and did draft, the very papers creating that limited partnership.

In the Court of Appeals, the issue is whether the District Court properly disposed of this matter by summary judgment, or whether the case ought to be resolved at a regular trial. Implicit in that question is the degree of involvement by Messrs. Morrel, Herrold and Shelton in the sale of the limited partnership which they drew up to unload their oil properties with: were they mere scriveners, or did their involvement go deeper? Also implicit in that substantive question before the Tenth Circuit is the proper interpretation of the never-construed 71 Okla.Stat. 408(b).

But in the Supreme Court, the issue appears to be the fine points of finality of consolidated orders, the docketing of appeals therefrom, the *nunc pro tunc* effectiveness of orders certifying decisions for immediate or interlocutory appeals, and the propriety, based on some conflict between the Circuits, of the Tenth Circuit's making its decision in this case prospective only.

Therefore, the instant Petition for Certiorari, which has nothing to do with the merits of this controversy, seeks Supreme Court review which irrespective of how decided offers to provide little to Bench or Bar in the way of precedential guidance. This instant Petition, therefore, evokes the memory of Roscoe Pound's immortal address, delivered early in this Century, on "The Causes of Popular Dissatisfaction with the Administration of Justice":

> . . . I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community.
>
> * * *
>
> One may search the recent English reports in vain for a case where an appeal has miscarried on a point of practice. Cases on appellate procedure are wanting. In effect there is no such thing. The whole attention of the court and of counsel is concentrated upon the cause. On the other hand, *our American reports bristle with fine points of appellate procedure.* More than four per cent of the digest paragraphs of

> the last ten volumes of the American Digest have to do with Appeal and Error. In ten volumes of the Federal Reporter, namely, volumes 129 to 139, covering decisions of the Circuit Courts of Appeals from 1903 till the present, there is an average of ten decisions upon points of appellate practice to the volume. Two cases to the volume, on the average, turn wholly upon appellate procedure. In the ten volumes there are six civil cases turning upon the question whether error or appeal was the proper mode of review, and in two civil cases the question was whether the Circuit Court of Appeals was the proper tribunal. I have referred to these reports because they represent courts in which only causes of importance may be brought. The state reports exhibit the same condition. In ten volumes of the Southwestern Reporter, the decisions of the Supreme Court and Courts of Appeals of Missouri show that nearly twenty per cent involve points of appellate procedure. In volume 87, of 53 decisions of the Supreme Court and 97 of the Courts of Appeals, 28 are taken up in whole or in part with the mere technics of obtaining a review. *All of this is sheer waste* which a modern judicial organization would obviate.

Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," delivered to the American Bar Association on August 29, 1906, reprinted in 8 Baylor Law Review 1, at 17-18, 19-20 (emphasis added). [Originally published in "Report of the 29th Annual Meeting of the American Bar Association, Part I," p. 395 (1906). The Baylor reprint (1956) was prefaced with some "golden anniversary" comments by Dean Pound himself.]

WHEREFORE, premises considered, Respondent prays that the Supreme Court deny a Writ of Certiorari in this matter.

Respectfully submitted,

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## APPENDIX A

Section 408(b) of the Oklahoma Securities Act provides as follows:

> Every person who *materially participates or aids* in a sale or purchase made by any person liable under subsection (a), or who *directly or indirectly controls* any person so liable, shall also be liable jointly and severally with and to the same extent as the person so liable, unless the person who so participates, aids or controls, sustains the burden of proof that he did not know, and could not have known, of the existence of the facts by reason of which liability is alleged to exist. There shall be contribution as in cases of contract among the several persons so liable.

71 Okla.Stat. 408(b) (emphasis added).

No. 87-1481

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

**REECE MORREL, DONALD HERROLD AND J. CHARLES SHELTON,**
**Petitioners**

*v.*

**TRINITY BROADCASTING CORP., A MICHIGAN CORPORATION**
**Respondent**

## REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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### I.

### This is a matter of imperative public importance requiring immediate review by this Court.

In its response, Respondent argues that this Court should deny certiorari because the order for which review is sought is interlocutory. Respondent claims that the "minutiae of the required docketing sequence" is not of imperative public importance because it involves neither constitutional nor separation-of-powers issues and is of interest only to these particular litigants.

Respondent has, however, completely overlooked the constitutional significance of the opinion below. This case centers almost *entirely* upon such fundamental constitutional principles as separation of powers and jurisdictional limitations of Article III courts. The overwhelming significance of this case is not due to the jurisdictional ruling of the Court of Appeals on the finality of orders in consolidated actions, an issue over which there is legitimate legal controversy. Rather, the critical significance of this case and what makes it of such imperative public importance is the fact that the Tenth Circuit is proceeding in this matter *in spite of its own finding that it is without subject-matter jurisdiction.*

The Court of Appeals could have held, as did the court in *In re Massachusetts Helicopter Airlines, Inc.*, 469 F.2d 439 (1st Cir. 1972), that an order in a consolidated case is final and then proceeded to hear the merits without injury to the public or the Constitution. Instead, the Court of Appeals found, as urged by Petitioner herein, that such orders are *not* final. Then, astonishingly, the court announced that it would hear the present matter anyway, because the appellate courts have discretion to "create" finality, and because a lack of jurisdiction is not such a serious thing after the holding in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982).

In so doing, the Court of Appeals has contravened the power of Congress to limit the jurisdiction of such Article III courts with the passage of 12 U.S.C. § 1291 and 28 U.S.C. § 1254(1). The court has assumed for itself the power to adjust its interpretation of the will of Congress in accordance with the court's own desire to hear a particular matter. Such a decision is also directly contrary to the ruling of the Supreme Court in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 369 (1981),

that "[b]y definition, a jurisdictional ruling may never be made prospective only." *Id.* at 379.

## II.

## The constitutional issues herein presented cannot be adequately addressed in later review.

This is not, as Respondent suggests, a matter which may be delayed until later review. First, as Respondent itself points out, if Petitioner herein prevails upon the merits, this matter will remain unaddressed by this Court, and the injury to the authority of both Congress and this Court will stand uncorrected. This case will remain as precedent for the proposition that finality is merely a procedural nicety and that a court of appeals may adjust the parameters of its own jurisdiction according to its own liking. Second, a three way split among seven circuit courts of appeals on an important jurisdictional issue will have gone unaddressed by this Court.

Furthermore, Respondent has not offered any justification for why the Court of Appeals should be permitted to proceed in a matter over which it lacks jurisdiction. In this particular case, a failure to resolve the jurisdictional question at this time will result in serious injury to this litigant. As a result of the court's wrongful assertion of jurisdiction, these litigants may be required to go to the Oklahoma Supreme Court for answer to certified questions before there is ever any ruling on the merits by the Court of Appeals. Once the Court of Appeals has eventually ruled on the merits, the litigants may then be returned to the district court for what will necessarily be a lengthy and complex trial followed, no doubt, by a second appeal to the Court of Appeals, all before this issue will again be heard before this Court. Thus, it may well be several years and much litigation before there is a final determination on the merits.

When considering this last point, the Court should note that although the order for which review is sought is interlocutory, it is completely unrelated to the merits, so that a ruling on the merits can in no way alter the significance of the interlocutory order or assist with the review of that order. Nor will review by this Court interfere with the actions of the Court of Appeals, except as it may prevent that court from proceeding without jurisdiction. Thus, the Petition for Certiorari is, to a large extent, in the nature of a Petition for a Writ of Prohibition.

Petitioners did not, as Respondent suggests, try an "end run" to the Supreme Court after briefing the merits in the Court of Appeals. Rather, Petitioners vigorously challenged the jurisdiction of the Court of Appeals both in the original briefs and in a Petition for Rehearing and Suggestion for Rehearing En Banc. The Petition for Certiorari and the brief on the merits were prepared separately and it is only by chance, and by virtue of the time limitations in the Court of Appeals, that the brief on the merits happened to be completed before the Petition for Certiorari.

Furthermore, Respondent is mistaken when it suggests that it may still be entitled to a later appeal because the other action is still pending in the District Court. The certification by the district court that the order was final had the effect of starting the time limitations for appeal. When Respondent failed to perfect its appeal, then the right to appeal was forever lost and would not be revived by additional orders in the district court.

## III

**The facts of this case present these issues as clearly as could any other case.**

Respondent asserts that the issues herein are not clearly presented. However, the issues could not possibly be more clearly presented. While other cases may require an examination of the nature and extent of the consolidation, this particular case does not. This is because in the present matter, the claims were all brought by a single plaintiff. The Plaintiff could have brought all the claims in one action but failed to do so. On the plaintiff's own motion, the district court consolidated the actions for all purposes. Thus, the only way in which the order in the present case could be deemed final is if this Court determines that Rule 54(b) *never* applies to consolidated actions.

## CONCLUSION

Respondent argues that all that is at stake in this case are mere "fine points of practice" and the "mere etiquette of justice." Far from being mere "minutiae of docketing", the limitations of 12 U.S.C. § 1291 and 28 U.S.C. § 1254(1) are placed upon the courts of appeals by Congress pursuant to the authority of Article III of the United States Constitution. When a court ignores these constitutional limitations, it is in effect challenging the right of Congress to limit its jurisdiction. The ramifications of such a decision simply cannot be overstated.

In the opinion below, the Tenth Circuit asserts that finality is discretionary, and that it may proceed without jurisdiction if it chooses to do so. Furthermore, the Tenth Circuit has expressly stated its intent to disregard the contrary admonition of this Court in *Firestone*. For these reasons, the present matter is of such imperative public importance that a Writ of Certiorari

should issue to the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

SNEED, LANG, ADAMS,
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